Supreme Court, U.S.
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No. 93-1502

In the Supreme Court of the United States

October Term, 1993

Arthur Bradley Samura,
Petitioner,

v.

Kaiser Foundation Health Plan, Inc.,
The Permanente Medical Group, Inc., and
Kaiser Foundation Hospitals, Inc.,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE

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I. INTRODUCTION.

Kaiser-Permanente's opposition to certiorari is not supported by any part of the decision of the court of appeal, by any other decision interpreting California's little FTC Act, Business and Professions Code § 17200, or by any other California law. Kaiser argues that the court of appeal held that the "unlawful" prong of § 17200 may be invoked only if it relates to an "explicit" or "express" statutory prohibition. In fact, these words do not appear in any pertinent part of the decision. The decision instead fully agrees with a uniform body of California law holding that the nature, scope and purpose of § 17200 is to enjoin *any* act or practice that violates substantive law.

This petition for writ of certiorari presents an important issue regarding heath services from hundreds of HMO to millions of HMO members, and the petition should be granted.

II. THE FEDERAL QUESTION IN THIS PETITION WAS NOT DISPOSED OF ON INDEPENDENT STATE LAW GROUNDS.

A. The Petition Presents A Substantial Federal Question.

The federal question presented in the petition is whether the Health Maintenance Organizations Act, 42 U.S.C. § 300e, prohibits HMOs from imposing "Third Party Liability" surcharges in addition to member dues, that is, charges at Non-Member Rates to members for each service actually furnished in addition to prepaid monthly dues when members are injured by third parties who financially compensate them.

Petitioner claims that the HMO Act on its face, 42 U.S.C. § 300e(b)(1), prohibits TPL charges. This provision

of the HMO Act states a general rule requiring that HMOs shall provide health care in exchange for prepaid periodic charges *only*, and then the Act enumerates certain exceptions to the general rule. Because Congress set forth a general rule, then set forth certain exceptions only, additional exceptions may not be read into the HMO Act. Petitioner's HMO Act claim is grounded entirely on the language and structure of the HMO Act itself; in other words, petitioner claims that TPL charges are not allowed as a matter of substantive law, correctly interpreted.

The California court of appeal erroneously interpreted the HMO Act not to bar TPL charges "as a matter of substantive law." App. 22-23. Then, the court of appeal held that petitioner could not base a § 17200 claim on the federal HMO Act because the Act did not bar TPL charges. App. 22-23.

The decision is not based on a holding that § 17200 only reaches acts that are "explicitly" prohibited, as Kaiser argues. Rather, the court of appeal reaffirmed that any act that is unlawful may support a challenge based on § 17200. The court of appeal held that trial courts should refrain from deciding § 17200 claims if they rely on a regulatory provision that confers an agency with discretion, if the agency has not exercised its discretion. App. 18-19.

Thus, had the California court of appeal concluded (as it should have) that the HMO Act does not allow TPL charges, and that Congress did not confer any discretion on the Secretary of the Department of Health, Education and Welfare, or its successor, the Department of Health and Human Services, to approve TPL charges, the court of appeal would have found a violation of § 17200. *See* App. 18-19. The decision on the federal question rests entirely on the court's erroneous conclusion that TPL charges are not unlawful in light of the federal HMO Act as a matter of federal substantive law. The decision does not rest on an independent state grounds.

B. Petitioner's HMO Act Claim Is Not Based On An "Implied" Policy Of The HMO Act.

The first step in Kaiser's effort to avoid certiorari is its assertion that petitioner agrees with Kaiser that the HMO Act does not directly prohibit TPL provisions, and Kaiser's assertion that petitioner has always argued that such a prohibition should be "implied from the goals of the federal statute . . ." *See* Kaiser's opposition, p. 5.

Actually, petitioner's claim rests on the structure and content of the statute, and on the application of the well-established rule of statutory construction, *inclusio unius est exclusio alterius. Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-617 (1980). Further, the prohibition against TPL terms is repeated in the HMO Act's regulations. 42 C.F.R. § 417.102(e), emphasis added; *see id.* at § 417.104(a).[1]

Both the HMO Act and its regulations prohibit HMOs from charging Non-Member Rates to members through TPL terms because the HMO Act does not allow charges based on the frequency, extent or kind of services actually furnished.

C. Petitioner's Claim Is Consistent With The Scope And Purpose Of § 17200.

The second step in Kaiser's attempt to avoid certiorari is its attempt at creating the illusion of an independent state law ground for the court of appeal's decision on the HMO Act. Kaiser argues the existence of

[1] Kaiser also errs by relying on the testimony of one of its witnesses, a former lower echelon federal employee who testified about what Congress intended when it amended the HMO Act in 1978, and about what HEW intended when it promulgated certain regulations in 1974. The testimony was irrelevant and incompetent.

a technical requirement to § 17200 that does not exist, and that is inconsistent with the nature, scope, purpose or history of § 17200. Kaiser's contention could not be further from the law of § 17200.

1. A § 17200 injunction is not limited to "explicitly" prohibited conduct.

Section 17200 broadly defines "unfair competition" to include "*any unlawful*, unfair or fraudulent business *act* or practice." (Emphasis added.)

In *Barquis v. Merchant's Collection Assn.*, 7 Cal.3d 94 (1972), the California Supreme Court explained: "The language of [§ 17200] . . . explicitly extends to any 'unlawful, unfair *or* deceptive business practice'; the Legislature, in our view, intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. " *Id.* at pp. 111-112, original emphasis.

The California Supreme Court recently reviewed the scope and purpose of § 17200, and the Court reaffirmed that § 17200's scope includes anything that can properly be called a business practice and that at the same time is forbidden by law. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266 (1992).

Neither the statute itself, nor the cases interpreting it, limit the scope of § 17200 to business practices that are "explicitly" forbidden by law.

2. The decision held that § 17200 reaches any unlawful acts.

The court of appeal did not distinguish the California Supreme Court decisions on § 17200, nor did it add a requirement that a challenged business practice be "explicitly" forbidden by law. *Cf.* Kaiser's opposition p. 5.

The decision below affirms that petitioner may rely on the substantive laws and regulations of any statutory enforcement scheme to supply the predicate "unlawful" practice within the meaning of § 17200. The decision unequivocally affirms the well-established rule that "An 'unlawful business activity' includes 'anything that can properly be called a business practice and that at the same time is forbidden by law.'" App. 6-7; *see also* 18-19.

Instead, the court of appeal rejected petitioner's HMO Act claim based solely on that court's conclusion that TPL terms and charges are not prohibited by the HMO Act as a matter of its interpretation of the federal HMO Act. App. 23. Whether the HMO Act allows TPL charges is the ultimate issue presented by this petition.

3. § 17200 may use statutes that do not have a private right of action.

Kaiser also argues that the lack of an express or implied private right of action in the federal HMO Act precludes § 17200 from borrowing the HMO Act as a standard. Kaiser's opposition, p. 7. However, the California Supreme Court long ago rejected the contention that the lack of a private right of action limits § 17200's ability to borrow the standards in other laws or regulations. In *Committee on Children's Television v. General Foods Corp.*, 35 Cal.3d. 197 (1983), the California Supreme Court noted that the parties "vigorously dispute" whether there was a private right of action in the state law, "but the question is immaterial since *any* unlawful business practice, including violations of the Sherman law, may be redressed by a private action charging unfair competition in violation of Business and Professions Code sections 17200 and 17203." *Id.* at pp. 210-211 (emphasis added). The court of appeal in this case did not even contend that the federal HMO Act does not provide a private cause of

action. *See* App. 23. Instead, the decision fully agrees with the well-established rule that a parallel action under § 17200 is proper even where a specific agency has been charged with enforcement of a statute.[2] App. 18-19.

4. Kaiser attempts to cloud the issue by interposing unique aspects of the Knox-Keene Act .

Kaiser's first argument below was that the Department of Corporations, had approved Kaiser's TPL term. The court of appeal disagreed. The court decided that the Department had not determined whether, or to what extent, TPL terms were lawful under the Knox-Keene Act. App. 10-11. The court also stated that the "matter plainly calls for legislative or regulatory action." App. 17, n. 5.

The court of appeal agreed with Kaiser's second argument, one unique to the Knox-Keene Act, and not transportable to the federal HMO Act, the California Legislature conferred exclusive regulatory power over HMOs to the Department of Corporations. *See, Van de Kamp v. Gumbiner*, 221 Cal.App.3d 1260 (1990). *Gumbiner* arose because the Attorney General and the Department developed conflicting definitions for self-dealing by HMOs, and HMOs could not satisfy both. The court of appeal reversed the trial court's injunction because it depended on sections of the Knox-Keene Act that were "purely regulatory" in nature, and intruded on the Department's exclusive regulatory power. App. 18, 22.

[2] Neither the federal HMO Act nor California's HMO Act, Calif. Health & Saf. Code § 1340 et seq. the "Knox-Keene Act," confer a private cause of action. The court of appeal nonetheless held that Samura could "sue to enjoin acts made unlawful by the Knox-Keene Act." App. 18-19.

The rationale was that the Department had not exercised its discretion regarding its regulatory power on the matters encompassed by the trial court's injunction.

Notwithstanding, the court of appeal's decision correctly holds that petitioner may base a § 17200 claim on any act or practice that is prohibited pursuant to the Knox-Keene Act or by the Department's regulations. App. 18.

Kaiser ignores several critical points in order to transmute the court of appeal's analysis of the Department's regulatory powers into a holding that § 17200 only reaches "explicit" violations of law. *See* Kaiser's opposition p. 6.

First, the court of appeal held that petitioner could use § 17200 to enjoin acts or practices that are unlawful under the Knox-Keene Act or the Department's regulations, so long as his § 17200 claim rested on a provision that defined unlawful acts or practices, rather than on a purely regulatory provision about which the Department has not exercised it discretion. App. 18, 22.[3] Second, the court of appeal's analysis regarding "purely regulatory" provisions plainly involves issues unique to the Knox-Keene Act and the California Legislature's decision to entrust the Department with exclusive power to define and regulate HMO conduct in order to avoid conflicting regulations.

Here, the federal HMO Act itself makes TPL charges unlawful. 42 U.S.C. § 300e(b)(1). The HMO Act's prohibition against TPL charges is not a purely regulatory guideline, it is a Congressional statement of substantive

[3] This portion of the holding follows the principles explained in *People v. McKale*, 25 Cal.3d 626 (1979) where the California Supreme Court ruled that § 17200 specifically may be used to enjoin violations of law despite a parallel enforcement scheme. *McKale*, *supra* at p. 633.

law. And, Congress did *not* grant the Secretary of HEW or HHS any discretionary power to create additional exceptions to the HMO Act's general rule. *See* S.REP.NO. 95-837, 97th Cong., 1st Sess. 9-10. Thus, the HMO Act defines TPL charges as unlawful. Finally, the HMO Act and its regulations provide that the states are to adopt and enforce the HMO Act's standards. *See* S.REP.NO. 100-204, 100th Cong., 2nd Sess. p. 11.

The California court of appeal recently applauded a private attorney general suit based on § 17200 seeking to prevent an HMO from violating Medicare regulations: "Congress clearly recognized the need for state and local assistance in regulating the marketing of HMO's and other supplemental health care packages to the elderly and disabled, and, quite the opposite of intending preemption, appears to have intended a call to the states (and private parties) for all the help it can get." *Solorzano v. Superior Court*, 10 Cal.App.3d 1135, 1149 (1992). Similarly, a § 17200 suit that borrows the standards of the HMO Act furthers the objectives of the HMO Act.

In sum, the federal HMO Act may supply the standard for § 17200.

D. The Preemptive Effect Of The Federal HMO Act Presents A Federal Question.

Kaiser's last argument is that § 17200 may only be used to enjoin violations of state law. *See* Kaiser's opposition pp. 8-9. However, as a matter of state law, § 17200 may be used to enjoin *any* violation of law, including violations of federal laws. *Farmers Ins. Exchange v. Superior Court*, 2 Cal.4th 377, 395 (1992); *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1264 (1992); Calif. Bus. & Prof. Code § 321 prohibits a "violation of any law of this state or any federal law . . . ."

Section 17200 reaches violations of federal law unless limited by federal preemption. Thus, injunctions will not issue under § 17200 where Congress has occupied the field, or where an injunction would conflict with the objectives of federal law. *See Solorzano v. Superior Court, supra*, 10 Cal.App.4th 1135 explaining that injunctive relief was denied in *People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal.3d 509 (1985) and *Diaz v. Kay-Dix Ranch*, 9 Cal.App.3d 588 (1970) because both cases "deal with fields absolutely and entirely preempted by federal law (immigration and Indian affairs.)" *Solorzano v. Superior Court, supra* at p. 1148, n. 14.) Where there is no preemption, violations of federal law may be enjoined based on § 17200. *See, People v. Highland Sav. & Loan Assn.* 14 Cal.App.4th 1692 (1993).

Federal regulations may also be "borrowed" to set the standards for § 17200 claims. California law looks to Federal Trade Commission's rules and regulations as "more than ordinarily persuasive" in guiding the California courts construing § 17200. *People ex rel. Mosk v. National Research Co. of Calif.*, 201 Cal.App.2d 765, 772-773 (1962); *O'Conner v. Superior Court*, 177 Cal.App.3d 1013, 1018 (1986).

Kaiser's argument that this case should be remanded before this Court reaches the merits of the petition, so that the court of appeal may decide whether the HMO Act preempts the application of § 17200, is without merit because the state court's decision on preemption is not a prerequisite to certiorari. Instead, the preemptive effect of the HMO Act (an effect that is extremely narrow) presents a federal question that is properly decided by this Court in the first instance.[4] *See Morales v. Trans World*

[4] Essentially the HMO Act preempts only those state laws that prevent the formation or operation of federally qualified HMOs. *See* 42 U.S.C. § 300e-10.

Airlines, Inc., ___ U.S. ___; 112 S.Ct. 2031; 119 L.Ed.2d 157 (1992).)

III. CONCLUSION.

This petition concerning the correct interpretation of the HMO Act presents a substantial federal question that affects hundreds of HMOs and many millions of their members. Petitioner respectfully requests that his petition for a writ of certiorari be granted.

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